United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,040

UNITED STATES OF AMERICA, Appellee

v

LIONEL O. SPENCER, Appellant

Appeal from the United States District Court
for the District of Columbia

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TABLE OF CASES

*Cases principally relied upon.

ISSUES PRESENTED*

I. Was it error for the Court to fail to sustain Appellant's Motions to Dismiss and For Judgment Notwithstanding the Verdict on the grounds of double jeopardy?

II. Was it error for the Court to fail to sustain Appellant's Motions for a Judgment of Acquittal and subsequent Motion for a Judgment Notwithstanding the Verdict on the grounds of inconsistent verdicts?

* This case has not been before this Court.

REFERENCES TO RULINGS

1. Ruling of the Court denying motion for dismissal on grounds of double jeopardy and lack of speedy trial. (tr, pp 2-11)
2. Ruling of the Court denying counsel opportunity in his opening statement of his proposal to show the jury that Defendant was acquitted of the traffic charge from which the charge of assaulting a policeman arose. (tr, pp 27-30)
3. Ruling of the court denying motion for directed verdict on grounds of double jeopardy. (tr, pp. 127-142)

STATEMENT OF THE CASE

Appellant was indicted on three counts of assault on members of the police force (22 DC Code 505 (a)). After he pleaded not guilty, his motions to dismiss on grounds of double jeopardy and the right to a speedy trial were denied. Appellant was acquitted on two of the three counts and convicted on count number one on December 9, 1969. Motions for a judgment notwithstanding the verdict were also denied.

Officers Clark and Pennington received a call to investigate an accident at 1733 Corcoran Street, Northeast, and upon arriving on the scene were told by the driver of one of the cars that the matter had been settled.

The officers then observed the other car, which they allege was driven by Appellant, backing away from the scene. They followed that car, which driver they allege went through a stop sign and was travelling in the dark with no lights.

The car stopped in an apartment house parking lot. Appellant, who maintained he had not been driving the car but was only riding in the back seat, alighted, and the officers asked to see his drivers permit. He reported that he did not have one.

The officers placed Appellant under arrest for driving without a permit but Appellant protested on the basis that he had not been driving the car. Appellant then attempted to go into the apartment building and alleges that he told the officers he was going into the building in order to get the person who was actually driving the car. The officers deny that he so informed them and Officer Clark physically prevented Appellant's entry into the building.

A scuffle ensued between Appellant and Officer Clark. Officer Pennington, after calling a transport, then went to the assistance of Officer Clark and also became involved in the scuffle. Officer Taylor then arrived and assisted in getting the struggling Appellant into the transport car. As a result of the scuffle, Appellant was charged with assaulting the three police officers.

Appellant sustained fairly serious injuries -- a broken leg and a head wound requiring six stitches. The officers received minor injuries -- cuts and bruises to hands, arms, legs, etc.

ARGUMENT

Since the arrest of Appellant was illegal as a matter of law, thereby giving Appellant the right to resist such arrest, the District Court erred in refusing to grant Appellant's motion for judgment of acquittal on charges of assaulting a police officer.

Warrantless arrest for a misdemeanor can be legal only if misdemeanor is committed in officer's presence or within his view. In the District of Columbia, the common law rule on arrest is followed. According to that doctrine, an officer may arrest without a warrant if there is a probable cause to believe a felony has been committed by the arrested person, or if a misdemeanor has been committed in the presence of the arresting officer, as shown in Stephens v. U. S.[1] The rule extends to arrests by police officers for municipal ordinance violations committed in their presence, as in Holmes v. U. S.[2] Added to the above is the provision of the D.C. Code 1967, sec. 4-140 (1969 Supp) which allows a warrantless arrest for offenses, including a misdemeanor, whenever the offense is committed in the officer's presence or within the officer's view.

The concept of "in an officer's presence" and "within an officer's view" have been widely treated and developed in numerous cases.

Thomas v. U.S.[3] contains authenticating discussion of the point:

> If it be assumed that the arresting officer was acting in good faith, the circumstances were such that it could be said that a misdemeanor took place in his 'presence' as distinct from 'within his view'. The former has customarily been taught to hold a less restricted spatial concept than the latter, and to comprehend awareness through senses other than that of vision alone.

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[1] Stephens v. U.S., 106 U.S. App. D.C. 249, 2 71 F 2d 832 (1959)

[2] Holmes v. U.S., 56 App. D.C. 183, 11 F 2d 571 (1926)

[3] Thomas v. U.S., 134 U.S. App. D.C. 48, 412 F 2d 1095 (1969)

Furthermore, the question of whether a misdemeanor was committed in an officer's presence or within his view must be decided in light of the situation at the time the officer made his arrest -- so, only evidence available at that particular time and not what developed later can be discussed, as in Green v. D. C.[4]

A very recent District of Columbia decision[5] expounds at length on the problem of what constitutes "within an officer's presence", in the following fashion:

> The officer is not limited to his sense of vision alone, i.e., it is not necessary for the officer to have actually seen every fact constituting the commission of the misdemeanor, but he may utilize all his senses. The use by the officer of all his senses of necessity contemplates that the officer will draw upon what is common knowledge under the circumstances. Thus a misdemeanor is committed in the presence of an officer when, with the aid of all his senses and what is common knowledge under the circumstances, the officer has knowledge that such is the case. (underline supplied)

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[4]Green v. D. C., 91 A 2d F 12 (1952)

[5]Taylor v. U. S., 259 A 2d 335 (1969)

> Warrantless arrest of Appellant was based on an alleged misdemeanor, but since Appellant actually committed no offense at all, no misdemeanor was committed in presence of arresting officers or within their view.

According to the testimony of the officers, three alleged misdemeanor offenses were at the root of Appellant's arrest. They resulted in three charges: operating a vehicle during the dark without lights; passing a stop sign; and operating a vehicle after revocation of driving permit. Officer Pennington testified that he charged Appellant with the first two violations, while Officer Clark charged Appellant with the third. (tr, 95)

The first charge--Appellant's supposed operating of a vehicle after dark with no light -- apparently evaporated into thin air. The testimony in the record with reference to his charge is most confusing.

According to Officer Pennington, the charge was still pending at the Court of General Sessions (tr, pp. 96, 98, 100, 103). However, such a statement could not be deemed true in view of Mr. Roy Dickinson's testimony. Mr. Dickinson is Deputy Clerk at the Court of General Sessions and in that capacity, he keeps in his custody the official records of that court (tr, 113). Those records show that no charge of driving after dark without lights was ever made against Appellant. (tr, 114)

Such evidence, standing alone, is more than sufficient, and is in fact conclusive, in showing that Appellant did not commit the misdemeanor of driving with no lights after dark. Hence, there is eliminated one of the three claimed bases for arresting Appellant without a warrant.

Moving to the second charge which the officers mentioned in their testimony, that of passing a stop sign, one is again confronted with confusing testimony. Officer Pennington's testimony parallels that which he gave with reference to the no lights charge. Thus, he maintained repeatedly that the

stop sign charge was still pending. But once more his testimony must be summarily rejected because it is totally contradicted by the official records of the Court of General Sessions. Deputy Clerk Dickinson testified unequivocably that those records, which were kept in the ordinary course of business, revealed that Appellant received a judgment of not guilty on the stop sign charge (tr, 116). This judgment indicates that Appellant in fact did not go through a stop sign as the officers claimed. Hence, such an alleged misdemeanor could not have been committed in their presence or within their view. Consequently, yet another possible valid basis for Appellant's arrest has been eliminated.

The final charge lodged against Appellant, and the final possible basis on which a legal arrest might have been predicated, concerned the violation of operating a vehicle after revocation of drivers permit. But, this charge has been disposed of in a proceeding prior to Appellant's trial in the instant case. The record reveals uncontradicted testimony that Appellant was found not guilty of the charge of operating a vehicle after revocation--both Deputy Clerk Dickinson (tr, 116) and Officer Clark, the testifying officer in the case, stated that Appellant was found not guilty in the revocation case. (tr, pp. 107, 119)

More important, the judgment of not guilty in the revocation case exposes a factor which goes right to the heart of this case. Appellant clearly admitted that he had no driver's permit on the night of the violations occurred because it had been revoked. (tr, 70) Thus, since his license had been revoked, the only possible basis for finding the Appellant not guilty of operating a vehicle after revocation of driving permit would be the fact that Appellant was not driving the car. In other words, given the fact that Appellant's license had been revoked, a not guilty judgment on the revocation

charge clearly embodies, and in reality equates, a finding that Appellant was not driving the car. This fact no doubt also was at the basis of the decision in the stop sign charge.

In view of the conclusion that Appellant was not driving the car, the alleged misdemeanor could not have been committed in the presence of the arresting officers or within their view, and the arrest must necessarily be regarded as illegal.

At this time, one relevant and significant point should be discussed. In deciding whether a misdemeanor was committed, a court must limit its view of the situation and events to the time when the officer was making the arrest.[6] In addition, the term "in the officer's presence" indicates a fairly broad spatial concept and includes an awareness achieved by the officer through utilization of his common knowledge under the circumstances as well as all of his senses, not just vision alone.[7, 8]

Had the arresting officers herein used all of their senses and faculties of reasoning in appraising the situation, they would have realized that Appellant had in fact not committed any misdemeanor. However, the officers apparently tried to rely solely on their powers of vision, which could not be expected to serve them very well if, as they allege, they were following in the dark a zip-zagging car, which had no lights on. The two officers who participated in the alleged following of the car insisted that Appellant had been driving the car. (tr, pp. 33, 49) They also testified that Appellant

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[6] Green v. D.C., supra

[7] Thomas v. U.S., supra

[8] Taylor v. U.S., supra

told them he was not driving the car and would discuss the matter further with them inside the apartment house. (tr, pp. 34, 41, 49) The officers' response to Appellant's statements was to grab him and place him under arrest. (tr, pp. 34, 35)

To place a citizen in our free society under arrest is a most drastic action, so drastic that our Constitution protects citizens from any arrest which is unreasonable. It is submitted that the officers' conduct in this case was most unreasonable. At a bare minimum and by their own admission, Appellant had said to the officers that he was not driving the car. But the officers proceeded to use physical force and to promptly arrest Appellant rather than attempt to use their powers to ascertain whether or not Appellant was actually driving the car.

Under these circumstances, it would seem that it was encumbant upon the officers at least to make an effort to probe more deeply into the matter. They would have in this case discovered that Appellant was in fact not driving the car. Appellant clearly states in his testimony that he told the officers that someone else was driving the car and that he wished to go into the apartment building to get that other person. (tr, p. 74) However, absent a deeper probe into the matter, the officers were sorely unaware of what had occurred in their presence and could not legally under the facts of this case have lawfully arrested Appellant.

One matter which merits further clarification is the Taylor[9] case. Though it bears certain similarities to Appellant's case, it is clearly distinguishable. First of all, in Taylor, the defendant claimed to have been driving the car, whereas Appellant herein did exactly the opposite. Secondly,

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[9] Taylor v. U.S., supra

in Taylor,[10] it was overwhelmingly clear that Defendant was seated behind the driver's wheel--he was observed in that position for some time by arresting officers; was in that position during the time that officers questioned him, and did not leave that position until requested to do so by the officers. In the instant case, the record reveals a far less reliable observance of Appellant in the driver's seat; the arresting officers were following a supposedly unlit car in the dark; and they never actually approached Appellant while he was in the position at the driver's seat. Thus, while in the Taylor[11] circumstances, it was a legitimate influence that defendant had been operating the vehicle, in the instant circumstances, no such inference was inferable.

One final point to be made on the arrest issue concerns double jeopardy. The lower court in refusing to hold the arrest unlawful as a matter of law, was really allowing reconsideration of an issue which had previously been litigated and decided. Appellant had been acquitted of the alleged traffic charges. That acquittal mandated the conclusion that Appellant was not driving the car, thereby eliminating any possibility that a misdemeanor was committed in the presence of the arresting officers. Yet, the court throws the whole matter open again and invited the jury to decide again what had previously been decided at the Court of General Sessions. The Court should have, instead, held the arrest of the Appellant to have been illegal as a matter of law.

A most recent decision expanding the concept of double jeopardy reiterated the proposition that the double jeopardy constitutional prohibition prevents putting a defendant twice in jeopardy for the same offense; i.e., it prevents

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[10] Taylor v. U.S., supra

[11] Taylor v. U.S., supra

trying him a second time for an offense for which he was previously tried.[12] Thus, in Price, it was held that a state could not retry an accused under the original indictment for murder after the accused at an earlier trial where he was charged with the same murder had been found guilty of a lesser included crime of manslaughter.

The same reasoning would apply in the instant case, with the result being that since Appellant had already been tried for the traffic charges, a refusal to hold the arrest illegal re-opened the issue of Appellant's guilt or innocence of those charges and puts him twice in jeopardy for the same offense.

The Court itself had grave doubts about the double jeopardy question:

> But if this man said he stopped him because he ran through the stop sign, and he has already been tried on that and found not guilty, then, I am wondering whether or not you can start trying him again on it. As I say, I am not closed on that. I mean, it is a serious question. . . (tr 142)

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[12] Price v. Georgia, 90 S Ct 1757 (1970)

Since Appellant was resisting an unlawful arrest, he has a valid defense to charge of assaulting police officers.

There is a right to resist an unlawful arrest. Numerous cases enunciate the principle that an illegal arrest can be resisted with force. The Supreme Court in DiRe,[13] stated:

> One has an undoubted right to resist unlawful arrest and courts will uphold the right of resistance in proper cases.

Curtis[14] adheres to the same doctrine and adds:

> This rule of law is based on the principle that an illegal arrest is an Assault and Battery, and one so arrested may either turn and walk away or match force with force to affect an escape.

However, as is pointed out in Abrams[16] the right of an unlawfully arrested person extends only to the use of unreasonable force. Hence, the right to resist unlawful arrest would not extend to killing an officer, though it may reduce a homicide charge from murder to manslaughter. Nor would the arrested persons right extend to the unnecessary inflictions of serious bodily harm.

Robinson[17] which analogizes an officer's unlawful arrest of a person to an assault and battery against that person, further states that the arrested person cannot initiate the use of force. Consequently, where the arresting officer makes no physical attempt to arrest, the arresting person may not use force.

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[13] U.S. v. DiRe, 332 U.S. 581, 68 S Ct. 222

[14] Curtis v. U.S., D.C. Ct. of App., 222 A 2d 840 (1966)

[15] State v. Robinson, 145 Me 77, 72 A 2d 260 (1950)

[16] Abrams v. U.S., ____ U.S. Ct. App. ____, 237 F 2d 43 (1956)

[17] State v. Robinson, supra

Appellant used no more than reasonable force in resisting the unlawful arrest.

It is clear from the record in the instant case that Officers Clark and Pennington made a physical attempt to arrest Appellant. Officer Clark, in his own words, "grabbed" Appellant, informed him he was under arrest, and then "assimilated an arrest hold". (tr, pp. 34, 35) Meanwhile, Officer Pennington went to call a transport, (tr, 35) and later attempted to assist Officer Clark physically in the arrest as did Officer Taylor, (tr, pp. 36, 49, 59) It is also clear that Appellant only walked away from the officers and made no attempt to touch any of them prior to their physical attempt to arrest him.

Appellant's response to this physical attempt to unlawfully arrest him, as such response emerges from the record, must as a matter of law be held to be within the bounds of the use of reasonable force. The picture which emerges from the testimony of the officers is as follows: When Officer Clark assumed an arrest hold on Appellant, the latter, according to the Officer's sworn testimony, "jerked free, twisting his shoulders" (tr, 35), which action caused the two men to fall over a nearby fence. (tr, 36) Officer Clark states that Appellant then began "punching and kicking" (tr, 36). (Note that there is no statement identifying whom Appellant was punching and kicking.)

At this point, according to Officer Clark, Officer Pennington approached, "with his baton in hand, his night stick". Officer Pennington became physically involved in the transaction and Appellant grabbed his baton and hit Officer Clark with it. (tr, 36)

Officer Clark then relates that while walking Appellant to the transport car, he started "getting a little rough," "hitting and romping" (tr 39). (Note that again, as with the "punching and hitting" activity, Officer Clark does not identify who was the object of the hitting.)

Officer Clark testifies further that Officer Taylor arrived on the scene and with the aid of another officer, tried to place Appellant in a transport. At this juncture, Appellant "kicked" Officer Taylor. (tr 37)

Officers Pennington (tr 49-50) and Taylor (tr 58-59) describe Appellant's activity in substantially the same manner--their testimony reveals no more forceful conduct on the part of Appellant than did the testimony of Officer Clark.

Thus, the activity of Appellant as it emerges from the record consisted of hitting, romping, struggling, etc. Such activity could never be deemed, even in and of itself, to exceed the limits of reasonable force. The most violent act of Appellant was to strike Officer Clark with the baton, but Appellant did so only when there were <u>two</u> officers physically coercing him.

However, when examining Appellant's activity in light of the officers' activity, i.e., in the light of what the officers were doing to Appellant, the latter's actions emerge as even more clearly within the bounds of the exercise of reasonable force.

To begin with, simply speaking in terms of numbers, the record reveals that at least three officers were struggling with the Appellant. More important, it appears from the testimony that one officer was holding Appellant while the other was hitting him. Officer Clark states:

> We went over the fence. . ., until my partner got the defendant down. I grabbed the stick away from him and I hit the defendant across the head, in an effort to subdue him.

Thus, Officer Pennington got Appellant down; Officer Clark then disarmed Appellant of the night stick, and proceeded to hit Appellant over the head with the weapon.

The wounds received by the respective participants in the struggle further help to elucidate the question of who was exercising reasonable force.

Appellant was bleeding, according to the testimony of Officer Clark (tr 40) and was taken to D. C. General Hospital. Appellant testified that the head wound from which he was bleeding required six stitches, and it was later discovered that he had suffered a broken leg. (tr, pp 73-74). In contrast to Appellant's quite serious injuries, Officer Clark suffered a bruise on the head, along with cuts on the hand, arm and knee (tr 44); Officer Pennington suffered scratches or brush burns to the hands (tr 51); Officer Taylor says he was taken to the hospital, but does not reveal what treatment he received. (tr 59)

Thus, the sum total of the testimony contained in the record reveals that Appellant could not as a matter of law be considered to have exercised more than reasonable force in resisting the unlawful arrest. In short, he was doing exactly what the law gives him the right to do when faced with an illegal arrest--that right is to "match force with force to effect escape."[18]

Viewed in the entirety, the situation in the instant case mandates the conclusion that Appellant's motion for judgment of acquittal should have been granted as a matter of law, the arrest of Appellant was illegal and Appellant, in exercising his right to resist that unlawful arrest, used no more than reasonable force.

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[18] Curtis v. U.S., supra

Since the jury returned an inconsistent verdict against Appellant, the conviction should be reversed.

Counsel for Appellant is aware that in the District of Columbia, the rule on inconsistent verdicts as enunciated in Dunn[19] and Barnes[20] is controlling. According to this rule, a jury verdict on several counts of a criminal indictment need not be consistent and a conviction will be upheld if there is sufficient evidence to support it even though conviction cannot be reconciled with acquittal on other charges.

It is suggested that the Court decline to continue to follow such a rule on inconsistency and adopt the sounder rule supported by a considerable line of authority. Under this rule, reversal of a guilty verdict on one count of a multi-count indictment would occur where that guilty verdict was inconsistent with a not guilty verdict on another count of the same indictment.

Many valid arguments have been presented in support of the rule requiring reversal for an inconsistent verdict. In the dissent in Dunn,[21] the idea that a verdict should be allowed to stand regardless of its inconsistency met with much disapproval. Thus, the dissent could not agree to sustaining a verdict if after the exclusion of facts which the jury necessarily found not proven in reaching its acquittal verdict on one count, it must be held as a matter of law that there was not sufficient evidence to warrant a guilty verdict on another count. According to the Dunn[22] dissent, as a policy matter, the court should not try to explain a conflict between verdicts reached by the jury. An inference that the jury made a mistake in attempting to reach a decision on the various counts of the indictment is regarded as far preferable to the

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[19] Dunn v. U.S., 52 S Ct. 189, 284 U.S. 390 (1932)

[20] Barnes v. U.S., 254 A 2d 724 D. C. Court of Appeals (1969)

[21] Dunn v. U.S., supra

[22] Dunn v. U.S., supra

inference made by the majority in Dunn[23] -- that in acquitting defendant on some of the counts of an indictment, while convicting on other counts, the jury illegally assumed the power to accord defendant a clemency.

In Spiller[24] the inconsistent verdict is viewed as one based on facts having no legal existence inasmuch as a conviction on one count, which must necessarily rely on facts charged in counts as to which there was an acquittal, is inexplicably inconsistent and hence, not sustainable. The conclusion of the court is overturning the inconsistent verdict was that

> When the liberty of a citizen is at stake, a jury will not be permitted to make a plaything of a verdict and blow hot and cold at the same time.

Particularly in point is State v. O'Neil[25] which held that where

> . . . two offenses growing out of the same transaction are charged in separate counts of an indictment or information and one offense includes elements or acts necessary to the commission of the other offense, a verdict of acquittal of the one is inconsistent with a verdict of guilty on the other.

State v. Fling[26] follows the same rationale:

> Whenever a jury finds defendant not guilty of a count in which is charged an act which forms an essential element of another count, a conviction on the second count annot be sustained.

In the instant case, the record reveals that the three counts of the indictment against Appellant concerned and grew out of one single transaction. This is especially true with regard to count 1, which charged assault of Officer Clark, and Count 2, which charged assault of Officer Pennington.

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[23] Dunn v. U.S., supra

[24] Spiller v. U.S., (CA 3) 31 F 2d 682 (1929)

[25] State v. O'Neil 167 P 2d 471 (1946)

[26] State v. Fling, 69 Ariz 94, 210 P 2d 221 (1949)

All of the actions of, and transactions transpiring around, these two police officers were inextricably intertwined: both officers repeatedly referred to themselves as partners (tr, pp. 34, 47); they were riding in the police scout car together, both receiving the radio call to investigate an accident at 1833 Corcoran Street. (tr, pp. 32, 47); both officers alighted from the scout car when it came to a stop in the parking lot near 1835 Central Place in an attempt to investigate who was driving the car they had been following (tr, pp. 35, 49).

Even more firmly linked was the activity of these officers at the very moment when the alleged actual assault was said to have occurred. According to the testimony of Appellant, Officer Clark as well as Officer Pennington were involved together in the scuffle with Appellant (tr 71); furthermore, in the testimony of the officers themselves, Officer Pennington was assisting Officer Clark (tr, pp. 36, 49). It indeed seems difficult to imagine a greater degree of cooperation and "oneness" of activity than existed herein.

Thus, at least two of the counts -- count 1 regarding Officer Clark and Count 2 concerning Officer Pennington -- arose from the same transaction. Yet, curiously enough, the jury acquitted Appellant as to Count 2, but convicted him as to Count 1. Such a situation appears to fall directly within the ambit of the O'Neil[27] and Fling[28] decisions. Hence, by its decision acquitting Appellant of assaulting Officer Pennington, the jury necessarily negated one or some of the essential elements of the offense which at the lower court were explained to them. (tr 168) Because the activities of Officers Clark

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[27] State v. O'Neil, supra

[28] State v. Fling, supra

and Pennington were so interlaced as to create fundamentally one identical transaction, such negation of any element of the offense as to Officer Pennington was also a negation of that element of the offense as to Officer Clark. In the interest of fairness and justice, and bearing in mind the drastic severity of of conviction of a criminal offense, the Court should conclude that the jury in convicting Appellant as to Count 1 did not fully understand the guidelines propounded to it and should reverse the verdict on Count 1.

Respectfully submitted,

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Counsel for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,040

UNITED STATES OF AMERICA, APPELLEE

v.

LIONEL O. SPENCER, APPELLANT

Appeal from the United States District Court for the District of Columbia

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Cr. No. 1179-69

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee the following issue is presented:

Whether appellant's acquittal of traffic charges which led to his arrest precluded the Government from subsequently establishing the lawfulness of such arrest in the prosecution of appellant for assaulting a police officer.

* This case has not been previously before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,040

UNITED STATES OF AMERICA, APPELLEE

v.

LIONEL O. SPENCER, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a three-count indictment filed July 24, 1969, appellant was charged with assaulting Officers George W. Clark, Richard J. Pennington, and John Taylor of the Metropolitan Police in violation of 22 D.C. Code § 505 (a). Following a jury trial before Judge William B. Bryant, appellant was found guilty of assaulting Officer Clark and not guilty of assaulting Officers Taylor and Pennington. On February 12, 1970, imposition of sentence was suspended, and appellant was placed on probation for one year. This appeal followed.

On April 12, 1969, at 8:50 p.m., Officers Clark and Pennington received a radio dispatch to investigate a

traffic accident in the vicinity of 1833 Corcoran Street, N.E. Arriving at that location in a marked police car, they observed appellant's car positioned behind another car which appeared to have been involved in an accident. Asked if there had been an accident, the driver of the latter vehicle replied that it had been settled. Appellant's car then backed north on Corcoran Street at a high rate of speed and proceeded east on Gallaudet Street. With emergency lights flashing the officers gave chase (Tr. 32, 95-96).

Driving a distance of several blocks, for part of which he had no lights burning, appellant made several turns and then entered an empty parking lot at 1835 Central Place, N.E., with the police car following at a distance of about one and one-half car lengths (Tr. 33-34). Appellant left his car and walked toward a doorway twenty feet away. Ten feet from the doorway Officer Clark asked to see appellant's permit (Tr. 34, 45). Appellant replied that he was not driving the car, and when asked again for the permit, he stated he had none and that the officers must conduct any business they had with him inside the building. Appellant started for the door, and Officer Clark stepped in his way. As appellant walked around him, Clark seized appellant's arm and told him that he was under arrest unless he could produce a valid operator's permit. Appellant replied he had no permit, and Clark advised he was under arrest (Tr. 34).

At this point Officer Pennington returned to the police car to summon a transport vehicle. When appellant continued walking toward the building, Clark attempted to hold on to appellant's belt (Tr. 35). Appellant twisted free, and he and Officer Clark fell over a three-foot fence which surrounded the parking lot (Tr. 35-36). As they regained their feet, appellant began "kicking and punching" Officer Clark (Tr. 36).

Officer Pennington returned from the police car, baton in hand, and as he attempted to lift appellant off Clark, appellant seized the baton and struck Officer Clark in the head with it (Tr. 36). After appellant and the two of-

ficers had fallen over the fence several times, Clark took the baton from appellant and struck appellant in the head (Tr. 37). As Clark accompanied appellant to the street, Officer Taylor arrived in a marked patrol car specially equipped to transport prisoners (Tr. 37). Prior to this time Clark and Pennington were the only police officers present (Tr. 35). As Taylor assisted in placing appellant inside the transport vehicle, appellant, his back on the rear seat of the car, kicked him in the face (Tr. 59).

All three officers were taken to Washington Hospital Center, where Clark was treated for lacerations of the arm, hand and knee and for a head injury. Pennington received treatment for abrasions to the ribs, hands and shins (Tr. 44, 51).

Mr. Roy Dickinson, Deputy Clerk of the Court of General Sessions, testified from court records that on April 14, 1969, appellant was charged with assaulting a police officer, driving on a suspended permit and passing a stop sign. On July 14, 1969, appellant appeared before Judge Kronheim and was found not guilty of both traffic charges (Tr. 114)..

Appellant testified that though the car chased by the police was his, he was not driving the car, was not aware that the police were following, and received six stitches in the head as a result of the struggle that followed his arrest (Tr. 69, 80, 73). He further stated that several weeks after his arrest he consulted a physician and learned that a bone was broken in his right leg (Tr. 74).

ARGUMENT

The lawfulness of appellant's arrest, having never been previously litigated, was properly left for determination at appellant's trial.

If two offenses must be proven by the same evidence or if the requisite proof for one offense is sufficient to support another, sequential prosecutions by the same sovereign

are prohibited by the Fifth Amendment's double jeopardy proscription. *Price* v. *Georgia*, 398 U.S. 323 (1970); *Waller* v. *Florida*, 397 U.S. 387 (1970). The mere presence of common facts and evidence in separate prosecutions, however, does not in itself support a claim of double jeopardy. *Morgan* v. *Devine*, 237 U.S. 632 (1918); *Harris* v. *United States*, 131 U.S.App.D.C. 64, 402 F.2d 205 (1968); *United States* v. *Bruni*, 359 F.2d 807 (7th Cir.), *cert. denied*, 385 U.S. 826 (1966). Though the Government, in prosecuting appellant for assault, proffered evidence to show he was lawfully arrested, the offenses were clearly not the same, and the former prosecution was no bar to the subsequent trial.[1] *E.g.*, *Harris* v. *United States*, *supra*.

Appellant appears to argue, however, that his conviction for assaulting a police officer following acquittal on traffic charges which led to his arrest constituted "reconsideration of an issue which had previously been litigated" in violation of the Fifth Amendment.[2] He asserts that by virtue of the former acquittal his arrest was adjudicated to be invalid as a matter of law and that the trial judge's failure so to instruct the jury was reversible error. The doctrine of collateral estoppel is applicable to criminal as well as civil cases and may preclude sequential prosecutions for dissimilar offenses where contemporaneous convictions would be proper. *Sealfon* v. *United States*, 332 U.S. 575 (1948); *United States* v. *Oppenheimer*, 242 U.S. 85 (1916); *Mahoney* v. *United States*, 137 U.S. App. D.C. 3, 420 F.2d 253 (1969). When a general verdict of acquittal in a previous adjudication could reasonably have been based upon a determination of but one issue, that

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[1] Though Justices Brennan, Douglas and Marshall, concurring in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), adopted a "same transaction" standard in determining whether a collateral prosecution violates the Fifth Amendment, this approach was rejected by a majority of the Court.

[2] Although he speaks in terms of double jeopardy, appellant's argument is more properly characterized as a claim of collateral estoppel.

issue may not be relitigated in a subsequent prosecution. *Ashe* v. *Swenson*, *supra* note 1. Appellant's assertion that his trial on traffic charges was an adjudication of the validity of his arrest, however, is untenable.[3]

A police officer may arrest without warrant one who commits a misdemeanor in his presence or within his view.[4] In determining whether an offense has been committed, an officer is not restricted to use of his vision alone but may use all of his senses. *Taylor* v. *United States*, 259 A.2d 835 (D.C. Ct. App. 1969); *cf. United States* v. *Cumberland*, 262 A.2d 341 (D.C. Ct. App. 1970). If an officer acting in good faith reasonably believes an offense has been committed in his presence, an arrest is valid regardless of whether an offense was in fact committed or not. *Thomas* v. *United States*, 134 U.S. App. D.C. 48, 412 F.2d 1095 (1969); *Taylor* v. *United States*, *supra*.

Clark's testimony was that he followed appellant's car into an empty parking lot at less than two car lengths' distance and that he thereafter saw appellant and no one else alight from the vehicle. The trial judge, after instructing the jury as to the elements of the offense of assault on a police officer in accordance with standard instruction No. 56,[5] further instructed that "if you find in the circumstances of this case that Officer Clark had no basis on which to arrest the defendant, or if you have a reasonable doubt as to whether or not Officer Clark had a basis for arresting the defendant on the traffic charges,

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[3] We do not deem it necessary here to consider the question of whether the United States and the District of Columbia are the same sovereign, since we maintain that in this case, as in *Fuller* v. *United States*, D.C. Cir. No. 21,729, decided July 31, 1970, slip op. at 2 n.2 "the facts were not found differently so as to create a collateral estoppel." Were we called upon to do so, however, we would argue that the prior prosecution on the traffic charges by the District of Columbia did not bar the instant prosecution by the United States. *See Randolph* v. *District of Columbia*, 156 A.2d 686 (D.C. Mun. Ct. App. 1959); *cf. Harris* v. *United States*, *supra*.

[4] 4 D.C. Code § 140.

[5] JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 56 (1966).

you must find the defendant's arrest was unlawful . . ." (Tr. 169-171). The acquittal by the Court of General Sessions judge was simply a determination by him, on the basis of the facts before him, whatever they may have been, that the District of Columbia had not proved beyond a reasonable doubt that appellant had violated certain traffic laws and regulations. It was not an adjudication of the lawfulness of appellant's arrest. Assuming *arguendo* the propriety of the trial court's submission of this issue to the jury in the case at bar, there was more than ample evidence on which the jury, under the court's guidance, could find beyond a reasonable doubt that Officer Clark was justified in arresting appellant on the traffic charges.[6]

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[6] As to appellant's contention that this Court should decline to follow *Dunn* v. *United States*, 284 U.S. 390 (1932), which appellant concedes is controlling as to the validity of inconsistent verdicts, we would simply point out that this Court has consistently rejected such an argument, most recently in *United States* v. *Fox*, D.C. Cir. No. 22,785, decided June 30, 1970. As the Court noted in *Fox*, slip op. at 6 n.21, "[t]he same rule obtains in every other federal circuit. [Citations omitted.] The great majority of state courts have concluded similarly. [Citation omitted.]" That, in our view, should end the matter, the dissenting opinion in *Dunn* notwithstanding.

In any event, the verdicts here are not necessarily inconsistent. *Cf. United States* v. *Simpson*, D.C. Cir. No. 23,269, decided November 17, 1970, slip op. at 2. Appellant was charged with assaulting three different police officers, and in reaching a verdict on each count of the indictment, the jury was instructed that it should consider whether the arrest was lawful, whether the force used in maintaining the arrest was reasonable, and, if the arrest was unlawful or implemented by unreasonable force, whether the force used in resisting such arrest was reasonable. The circumstances of each assault as determined by the jury may well have accounted for different verdicts. *See State* v. *Barker*, 94 Ariz. 383, 385 P.2d 516 (1963), where on facts quite similar to those in the case at bar the Arizona Supreme Court distinguished its prior holding in *State* v. *Fling*, 69 Ariz. 94, 210 P.2d 221 (1949), on which appellant relies.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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